

COMPOUNDING ERRORS: SUSPENSIVE CONDITIONS IN THE QUEBEC LAW OF SUCCESSIONS

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1. Introduction

The effect of a small snowball turning into a massive snow boulder as it rolls down the hill is a plebeian illustration of the concept of compounding. Compounding interest on investments is desirable. A jurisprudential error in one decision that subsequent decisions reiterate and perpetuate is an example of undesirable compounding with adverse effects.

While there may be different interpretations of testamentary clauses, interpretation must be grounded in principles of law. If a testamentary provision is interpreted by a court in such a way that it distorts basic and fundamental principles of law, it is a misinterpretation that merits both criticism and correction.

A recent judgment of the Superior Court of Quebec (the “Superior Court”) is a graphic illustration of the foregoing proposition. *In the Matter of the Estate of the Late Iuliana Danilevici Lupu*,¹ Poirier J. relied upon a previous judgment, *Succession de Glickman*² rendered by the Quebec Court of Appeal (the “Court of Appeal”), without making any nuanced differentiations. This reliance had serious ramifications for *Lupu* and if perpetuated will continue to produce significant deleterious effects.

The appeal from the *Lupu* judgment scheduled for June 5, 2024 was settled by the parties, without any admissions.³ Thus, the prospect of perpetuation of what the authors perceive to be a judicial error poses a substantive risk for the appropriate application of the principles of the law of successions as enunciated in the *Civil Code of Québec* (“CCQ”) and the civilian

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1. *In the Matter of the Estate of the Late Iuliana Danilevici Lupu* (February 21, 2023), Doc. 500-17-121840-220 (S.C.M.) [*Lupu*].
2. *Succession de Glickman*, 2021 QCCA 260 (C.A. Que.) [*Glickman*].
3. *Succession de Danilevici Lupu*, 2024 CarswellQue 5653 (C.A. Que.).

legal tradition for future cases with similar scenarios and testamentary clauses.

2. Summary Of Lupu

In *Lupu*, a declaratory judgment was sought by the liquidator (and daughter of the deceased) Corina Lupu to determine if the residual legacy bequeathed to her brother, Sorin Lupu (“Sorin”), pursuant to their mother’s will (the “Lupu Will”) had lapsed, such that Sorin’s estate did not have an interest in the mother’s residual estate. Sorin died about 16 months after his mother, but before Corina had distributed to him his share of their mother’s estate.

The case turned on the interpretation of two clauses in the Lupu Will, namely Articles 8.2 and 15.1. One was the standard survivorship clause at Article 15.1, which provided that the benefits conferred were conditional upon the beneficiary surviving her by at least 30 days. There was no debate as to the meaning of this condition. Sorin did survive his mother by more than 30 days and, moreover, had accepted his legacy⁴. The contentious clause was Article 8.2 which stated as follows:

8.2 In the event either of my children predeceases me or dies before receiving the whole or any part of his or her share of the Residual Property, leaving issue, I hereby bequeath such share or remainder thereof to his or her children in equal shares, share and share alike.

(emphasis added)

The Superior Court declared that Sorin’s two children were entitled to inherit his share directly from the deceased, reasoning that Articles 15.1 and 8.2 are two consecutive suspensive conditions, whereby the first suspends the delay to inherit for 30 days, followed by the second, which extends the suspension until the day the liquidator distributes the estate. From an interpretation point of view, the order of the conditions strikes one as unusual, if not, contradictory. However, what is most disturbing is that the interpretation accorded by the Superior Court seems to ignore basic principles of the law of successions.

The court recognized the applicability of Article 8.2 as a suspensive condition and pronounced the lapse of the son’s

4. There are no prescribed formalities for acceptance under the CCQ. Acceptance may be express or tacit pursuant to Article 637 CCQ. Sorin instituted proceedings against Corina regarding her administration of their mother’s estate which qualifies as acceptance.

legacy and the resulting devolution to his children by representation.

3. Fundamental Principles of the Law of Successions

One must review the conditions in both *Lupu* and *Glickman* against the backdrop of the basic principles underpinning the Quebec law of successions. What is primordial is the transmission of property from a deceased to a legatee that occurs automatically and instantaneously at the moment of death.

The transmission of a person's patrimony is an immediate consequence of death. It is the fact of death that places the legal heir or the legatee by universal or general title, in the position of holding all, or a fraction of, the deceased's patrimony. The transmission to either kind of successor, intestate or testamentary, operates instantaneously upon the death of a person, *de plano* (by operation of law), without any formality. Both classes of successors become owners in the place and stead of the deceased.⁵

The construct of the civil law of successions uses very specific terminology and unique concepts. The old French customary law principle, "*le mort saisit le vif*"⁶ is a cornerstone of the civil law of successions. It is to be understood as the fiction according to which the person of the deceased is continued in that of his or her heirs.

Seisin is exercised for the time necessary for liquidation (Article 777 CCQ). Seisin is a concept used in the civilian tradition pertaining to fiduciary control over property in which another has a beneficial interest. The concept also features in English land law and is traceable in that instance to both pre-codification Anglo-French forms and, ultimately, Roman law. Much has been written about seisin but for the purpose of the present article, suffice it to say that it means the control and possession of property for the purpose of the liquidation or settlement of the succession. It does not displace ownership. Under the previous *Civil Code of Lower Canada* ("CCLC"),⁷ there was a clearer demarcation, at least in the doctrine,⁷

5. Jacques Beaulne, mis à jour par Christine Morin, *Droit des successions*, 5^e d., Montréal, Wilson & Lafleur, 2016, par. 169.

6. Translated as "death seizes the living".

7. Jerome C. Smyth, "Seizin in the Quebec Law of Successions," (1956-57), 3 McGill.L.J. 171.

between *de jure* (legal) and *de facto* (factual) seisin. The heirs retained *de jure* seisin and the executor (now called the liquidator) exercised *de facto* seisin for the time necessary to settle the estate. Once the estate was settled, the executor was discharged and released of his *de facto* seisin, and both *de jure* and *de facto* seisin belonged to the heirs.

The ownership rights of successors who will become the heirs and particular legatees is subject to their acceptance of the succession (Article 619 CCQ). Note that those who are entitled as intestate heirs or legatees by universal or general title are called “successors”; they have a vocation to succeed to all or a portion of the succession. Upon acceptance, these successors become heirs (Article 738 CCQ). While the particular legatee is a successor, even upon acceptance, this legatee is not referred to as an heir.

Although the transmission operates automatically and the successor is then considered to be vested with the deceased’s patrimony or a portion of it, and is, therefore, held to be the owner of the deceased’s property from the time of this death, the successor need not remain an heir. There are no “necessary” heirs.

Article 630 CCQ provides that every successor has a right of option to accept or renounce the succession. A renouncing party is deemed never to have been an heir. Acceptance confirms the transmission which took place by operation of law at the time of death (Article 645 CCQ). Though the transmission of the rights of ownership to the heirs and particular legatees takes place retroactively to the time of death upon acceptance, the liquidator continues to exercise the heirs’ and particular legatees’ seisin for the period of liquidation, which includes the delivery of the property and until the liquidator is discharged from the office and the liquidator’s duties end, which marks the end of liquidation. The distinction between ownership and seisin is critical. The mere delaying of the act of delivery does not defeat the transmission of ownership that took place at the time of death by operation of law.

4. Conditional Legacies and Lapse

Legitimate conditions and terms may be attached to legacies, under the Quebec law of successions, as is the case with all juridical acts, Article 757 CCQ states that a condition that is

impossible or that is contrary to public order is deemed unwritten. It is acknowledged in jurisprudence and doctrine that the modalities of obligations with respect to conditions and terms at Articles 1497 to 1517 CCQ apply to the interpretation of conditions and terms attaching to legacies.

What is germane for the present discussion are the effects of these modalities for a legacy. Lapse is one of the terms used in the civil law for a particular type of failure of legacy. Articles 747 and 750 CCQ were central to the debate on the lapse of a legacy in both *Lupu* and *Glickman*, and state as follows:

747. Where the payment of a legacy is subject to a term, the legatee nevertheless has an acquired right from the death of the testator which is transmissible to his own heirs or legatees by particular title.

The right of the legatee to a legacy made under a condition is also transmissible unless the condition is of a purely personal nature.
(emphasis added)

[...]

750. A legacy lapses when the legatee does not survive the testator, except where there may be representation.

A legacy also lapses where the legatee refuses it, is unworthy to receive it or dies before the fulfilment of the suspensive condition attached to it, if the condition is of a purely personal nature.
(emphasis added)

The crux of the question as to the alleged lapse of the conditional legacy in these decisions was whether the condition is “of a purely personal nature” evidenced in both Articles 747 and 750 CCQ *in fine* (see emphasis added).

The law allows a testator or testatrix to derogate from the general principles outlined above and to suspend the automatic transmission of property to his or her legatees by way of a suspensive condition. According to the recognized legal precept, the scope of derogations or exceptions to a general rule or principle is restricted and should be given a narrow interpretation.

Article 15.1 in the *Lupu* Will is a survivorship clause (making the entitlement to the legacy conditional upon surviving the testatrix, for example, 30, 60 or 90 days) which is commonplace in testamentary documents. This condition is purely personal to the legatee and is not contrary to public order (see Articles 747, 750 and 757 CCQ).

There is a judicial definition of “purely personal” in the context of purely personal rights which emphasizes that the holder of such rights must remain the sole master (“*le seul maître*”) as to their exercise.⁸ A purely personal condition must have an intimate quality, depending solely on the legatee who must fulfill the condition, such as surviving a predetermined length of time.

In the Lupu Will, there was such a clear, explicit, and purely personal suspensive condition at Article 15.1, captioned “DELAY TO INHERIT”, which reads as follows:

15.1 All benefits conferred upon a beneficiary hereunder are conditional upon such beneficiary surviving me by at least thirty (30) days but this shall not be interpreted as excluding a beneficiary from inheriting by representation when so provided under the terms of my Will.

(emphasis added)

The benefits are expressly described as being “conditional”. Clearly, the intent of Article 15.1 was to suspend the transmission of the deceased’s property to her residual legatees for a period of 30 days from her death and to make their inheritance conditional on their survival of the 30-day suspensive condition.

Article 15.1 is also clear that if a legatee does fail to survive her by 30 days, there will be representation in favour of that legatee’s issue. The alternative could have been accretion in favour of the surviving legatee. Instead, the deceased opted for representation.

Article 8.2 of the Lupu Will explicitly provides for representation if there is issue, whereas Article 8.3 provides for accretion if there is no issue. Articles 8.2 and 8.3 of the Lupu Will read as follows:

8.2 In the event either of my children predeceases me or dies before receiving the whole or any part of his or her share of the Residual Property, leaving issue, I hereby bequeath such share or remainder thereof to his or her children in equal shares, share and share alike.

8.3 In the event either of my children predeceased me or dies before receiving the whole or any part of his or her share of the Residual Property, leaving no issue, I hereby bequeath such share or remainder thereof to my other child, either surviving or represented in equal shares by roots.

8. *Malenfant c. Samson Belair/Deloitte & Touche inc.*, 1997 CarswellQue 1081 (C.A. Que.), reversed 1999 CarswellQue 2994 (S.C.C.).

The logic of the Lupu Will is to determine whether a legatee has failed to fulfill the suspensive condition at Article 15.1 and, in case of failure, to apply the representation clause at Article 8.2 in favour of that legatee's issue. If the legatee has left no issue, then the accretion clause at Article 8.3 becomes applicable in favour of the co-legatee. Essentially, Articles 8.2 and 8.3 of the Lupu Will are commonly used testamentary provisions for a default or secondary devolution relying upon representation or accretion. The term "conditional" is not used in Articles 8.2 and 8.3 and, accordingly, they should not be classified as being suspensive conditions.

Since Sorin had already fulfilled the suspensive condition at Article 15.1 and had already accepted his share of his mother's estate before he died, the transmission of his share of his mother's estate to his patrimony occurred retroactively to the date of his mother's death, by operation of law. His mother's estate had, therefore, been undisputedly transmitted to his estate at the date of his death.

There was no ambiguity to resolve in light of the above. The trial judge's fundamental underlying error of law is his failure to adhere to, and apply, the basic principles of the law of successions and thereby simply give effect to the transmission which occurred by operation of law, whereby Sorin received his share of his mother's estate upon his fulfillment of the suspensive condition at Article 15.1 and his acceptance of his mother's estate.

5. Rules of Construction

The judgment in *Lupu* is also open to criticism given that in interpreting Article 8.2 of the Lupu Will, the trial judge failed to correctly apply the rules of construction by interpreting Article 8.2 as a second, consecutive suspensive condition that had the effect of prolonging the suspensive period stipulated in Article 15.1.

The trial judge also read the two conditions at Articles 15.1 and 15.2 as being contradictory.⁹ The authors are of the view that the trial judge failed to give Article 8.2 a meaning derived from the Lupu Will as a whole, especially in light of Article 15.1, and imputing to Article 15.1 a meaning that gives it no effect. Articles 1427 and 1428 CCQ regarding the interpretation

9. *Lupu*, *supra*, note 1, para. 42.

of contracts, which are applicable to the interpretation of wills,¹⁰ state:

1427. Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.

1428. A clause is given a meaning that gives it some effect rather than one that gives it no effect.

The only tenable conclusion for the court was that Article 15.1 is the sole suspensive condition in the Lupu Will while Article 8.2 provides for the representation to which Article 15.1 refers in the case of a legatee who fails to fulfill the suspensive condition at Article 15.1.

Instead, the trial judge erred in law by incorrectly applying the rules of construction and reading Article 8.2 as a second, consecutive suspensive condition that extends the 30-day condition of Article 15.1 until the day that the liquidator is ready to distribute the mother's estate.

By reading Article 8.2 as a second, consecutive suspensive condition, the trial judge deprives Article 15.1 of any effect since the putative longer suspensive effect of Article 8.2 would subsume the shorter 30-day suspension of 15.1, rendering the latter superfluous and thus ineffective.

To the extent that Article 8.2 could have operated as a suspensive clause, it could only have been operative during a very narrow, limited period, being the period of deliberation prior to the exercise of Sorin's right to accept or renounce the legacy. Had Sorin died without having exercised his option to accept the legacy, Article 8.2 would have had its full legal force and effect to cause Sorin's legacy to lapse. However, once Sorin accepted the legacy, he had an acquired entitlement, not subject to being defeated by a clause setting out the rules of representation in case Sorin had not acquired entitlement, which he had. Sorin did exercise his right to accept his share of his mother's estate, thus clearly and convincingly rendering Article 8.2 devoid of meaning as a suspensive clause.

10. Both the jurisprudence and doctrine have long established that the rules for the interpretation of contract at Articles 1425 to 1432 CCQ are applicable, *mutatis mutandis* to testamentary interpretation; see *Métivier v. Parent*, [1933] S.C.R. 495 (S.C.C.).

6. Glickman Decision

As noted above, in arriving at its decision, the Superior Court in *Lupu* relied upon the Court of Appeal's decision in *Glickman*. Briefly, in *Glickman*, while refusing to intervene to reform the lower court's purview inferring a trust, the Court of Appeal nevertheless opined that a clause textually similar to Article 8.2 in the *Lupu* Will was a valid suspensive condition. The deceased bequeathed the residue of her estate in the event her spouse had predeceased her (which event did occur) to her three children. The Superior Court found that a trust had been created and interpreted the impugned clause in this context. The deceased's son, who had received a partial distribution, died after his mother but before the distribution of his full share. The Superior Court, in inferring a trust, held that this undistributed share accrued to his siblings and not to his own estate. The Court of Appeal, while upholding the purview of the trial judgment, considered the trust element to be of no consequence and asserted the validity of the impugned clause as a suspensive condition.

The crucial error in *Glickman* is at paragraph 26 of the Court of Appeal's decision, stating that the end of the exercise of seisin by the liquidators (implicitly meaning the end of liquidation) is "a clearly ascertainable date." This error was perpetuated by the trial judge in *Lupu* at paragraph 65 of the *Lupu* decision to the effect that the date is determinable.

The duration of liquidation process depends on a variety of external players (who may be diligent or not) and on the vagaries of circumstances implicated in the process such as the liquidator, tax authorities, financial institutions, real estate agents, multijurisdictional assets, *post mortem* tax strategies, etc., none of which are intrinsically personal to the legatee. Tax audits and litigation, for instance, notoriously negate the viability of the concept of an "ascertainable" date.

By contrast with the condition in Article 15.1 of the *Lupu* Will, which reduced to its bare terms, depends on the life or death of the legatee within a quantified definitive time period, the so-called condition in Article 8.2 depends on no personal elements which would render the legatee "*le seul maître*" of the putative suspensive condition.

All that one could rationally and honestly affirm is that the liquidation ends when the liquidator is ready to distribute, which

would elicit the question: “when is that?” The reply is then “when the liquidator is ready to distribute” which elicits the further question of “when is that?” The reply is “when the liquidation ends”. These are circular or tautological statements devoid of any meaning. Practitioners can attest that delivery of estate property can often take years to accomplish. It is a date that is neither ascertainable nor determinable, a fact which the legislator recognizes implicitly in the codification of the law.

It is indeed instructive to consider the relevant provisions in the CCQ that militate against the concept of liquidation being a clearly ascertainable or determinable date and that also raise the question as to what standard could be applicable to establish “ascertainable” or “determinable”.

Article 776 CCQ lists the steps in the process of liquidation. It neither defines liquidation nor establishes an end date. In fact, the only reference to a time period in the liquidation process is found at Article 632 CCQ with respect to the option period, being either six months from the day the successor’s right arises or 60 days from the closure of inventory. Even in this instance, there is no ascertainability because the inventory may take much longer than six months, necessitating at times, judicial extensions (Article 633 CCQ).

Furthermore, these steps do not implicate or compromise the right of ownership transmitted to the heir at the moment of death. Neither do they compromise the heir’s legal seisin; during the liquidation process, the heir retains *de jure* seisin (acquired at the moment of death) and the liquidator exercises *de facto* seisin (that is, implicating control and possession but not ownership).

Article 806 CCQ on the duty for annual accounting if the liquidation takes longer than one year injects further uncertainty about the determinable end of liquidation by envisaging a protracted process of liquidation.

Article 819 CCQ specifically addresses the end of liquidation as follows:

819. Liquidation is complete when the known creditors and the known legatees by particular title have been paid or when payment of their claims and legacies is otherwise settled or assumed by heirs or legatees by particular title. It is also complete when the assets are exhausted.

It ends by the discharge of the liquidator.

There are four different possibilities for the end of liquidation

expressed in this provision. This does not connote ascertainability.

On the contrary, the end of liquidation is completely unascertainable and open-ended and thus a suspensive condition dependent upon the end of liquidation cannot be valid. It would fall within the prohibition at Article 1500 CCQ, which states:

1500. An obligation that depends upon a condition that is at the sole discretion of the debtor is null; however, if the condition consists in doing or not doing something, the obligation is valid, even where the act is at the discretion of the debtor.

Pursuant to Article 750 CCQ, which is cited in *Glickman*, lapse occurs if the condition attaching to a legacy is not fulfilled, only if the condition is of a purely personal nature.

As noted above, the jurisprudential definition of “purely personal” emphasizes that the creditor must be “*le seul maître*” of the fulfilment of the condition. In the case of Article 8.2, the fulfilment of the condition remains subject to extraneous elements which are not “purely personal” to Sorin. Sorin was not “*le seul maître*” of the liquidation process. The only valid condition in the Lupu Will was at Article 15.1 entitled “Delay to Inherit”, being a condition inherently attached to the legatee. It bears repeating that Article 8.2 can only be valid as a representation clause.

With respect to the second paragraph of Article 819 CCQ, the liquidator is discharged pursuant to Article 822 CCQ after acceptance of the final account by the heirs. However, this is also an undeterminable event because it may entail a judicial rendering of an account pursuant to the second paragraph of Article 821 CCQ. Query: if no final accounting is rendered, is the liquidator discharged and is the liquidation process terminated? It appears that the answer is no. When does the heir “receive” this legacy? Clearly, there is no ascertainable date.

By way of contrast, as a final argument, it is significant to note the striking terminological differences between the first and second paragraphs of Article 918 CCLC (an article cited in the *Glickman* decision at paragraph 30) and the first paragraph of Article 777 CCQ:

918. Testamentary executors, for the purpose of the execution of the will, are seized as legal depositaries of the moveable property of the succession, and may claim possession of it even against the heir or legatee.

This seisin lasts for a year and a day reckoning from the death of the testator, or from the time when the executor was no longer prevented from taking possession.

777. The liquidator has, from the opening of the succession and for the time necessary for liquidation, the seisin of the heir and the legatees by particular title. [emphasis added]

Under the CCLC, there was a definite limitation as to the period of time the executor's seisin lasted: it was one year and a day. No such temporal restrictions are found in the CCQ.

Simply stated, there is no clear ascertainable date for the end of the liquidation process. Ascertainable means determinable with certainty. The law of successions favours certainty. The rules for succession in the CCQ are constructed upon the concept of certainty, as for example the rules governing legal devolution, rights of the State, representation, definition of a will, valid forms of will, revocation of wills and legacies, qualities to inherit, debt liability and order of payment for solvent and insolvent estates, return, and the capacity, functions and powers of the liquidator. Certainty engenders legitimate expectations. Certainty is the matrix of enforceability and validity. In other words, certainty must be embedded in enforceability.

The lack of certainty in Article 8.2 of the Lupu Will necessarily entails its unenforceability as a suspensive condition. It is only valid as a representation clause and did not have the effect of causing the lapse of Sorin's legacy since Sorin had already manifested his acceptance. Accordingly, the court should have held that Sorin's estate was fully entitled to his share of his mother's estate.

7. Contrasting Decisions

There are two decisions that correctly adhered to the principles of the law of successions in the interpretation of the effects of a so-called suspensive condition, which, regrettably, did not inform the Court of Appeal's reasoning in *Glickman* or that of the Superior Court in *Lupu*.

In *Glickman*, whereas the trial judge had distinguished the facts of *Warhaft v. Warhaft Estate*¹¹ in inferring that the impugned clause before her created a trust, for its part the

11. *Warhaft v. Warhaft Estate*, 2002 CarswellQue 2978 (C.S. Que.) [*Warhaft*].

Court of Appeal omitted to consider the principles of *Warhaft* in its unfortunate assessment of the superfluousness of the trial judge's trust theory and erroneous assertion of the validity of the impugned clause as a suspensive condition.

In *Warhaft*, the mother's will provided that the residue of her estate be divided into three equal shares: one for her son, David, one to her son Stephen, and one to her grandchildren and niece, in "absolute ownership" of their respective shares of the estate. The will also provided that if either of the sons died "before coming into possession of their respective share", then that son's share would "devolve to their respective children". David died seven months after his mother but the estate had not yet been finalized. The judge held that should a son predecease, then his share would devolve to his children. Since the sons were alive when their mother died, they were entitled to inherit. When David died, this did not trigger representation, as it should not have in *Lupu*.

The Court of Appeal's opinion in *Glickman* would have such a clause mean that the death of David at any time after his mother's death would cause his share to devolve to his children. On the contrary, the court in *Warhaft* correctly concluded that the right of ownership of any distributed portion as well as of any undistributed portion was in the patrimony of the son who survived his mother, regardless of the fact that he died before the entire estate was distributed.

Professor Jacques Beaulne's commentary on the *Warhaft* decision should have been heeded by the Court of Appeal in *Glickman* before concluding that the impugned clause was a valid suspensive condition:

...the judge had to decide if, within the meaning of the expression "before coming into possession", the possession in question corresponded to physical possession of the bequeathed property; the judge concluded that such interpretation would have been "irrational" (par. 22).¹²

[translation]

To contend that Article 8.2 is a valid suspensive condition attaching to Sorin's legacy is equally irrational and incompatible with the principles of the law of successions discussed above. Sorin did acquire a full, absolute and unfettered right of ownership of one-half of the residue of his mother's estate at the moment of his mother's death, which right he accepted. Consequently, Sorin did not acquire a "potential" or

12. *Supra*, note 4, p. 367, note 1939.

contingent or future right of ownership, dependent upon surviving the nebulous date of delivery of his share of the estate, a date upon which he would physically receive or take possession of the bequeathed property. The terms “receiving the whole or any part of his or her share” used in the Lupu Will and coming into possession of their respective share“ in the will in *Warhaft* are synonymous.

To paraphrase paragraph 22 of *Warhaft*, this interpretation of the alleged suspensive condition would mean that the period between his mother’s death and Sorin’s death would have been a legal void.¹³

Both the Superior Court in *Lupu* and the Court of Appeal in *Glickman* resorted to a rudimentary and restrictive interpretation of the term “receiving”. Both courts imported a meaning to the term that is untenable and inconsistent in the context of the law of successions. Both courts reduced the term to physical receipt or delivery. Furthermore, receiving does not necessarily mean physical acquisition but, in a broader, fairer, and legally-consistent sense, it encompasses also acquisition of entitlement. The terminology used in the CCQ in the description of legacies (Articles 732 and 733 CCQ) is entitlement-based. Entitlement equates to having a right to something or having an interest in something.

In *Lupu*, the court insisted that the decision rendered in *Grosterne (Issenman) c. Succession de Sanders (Issenman)*¹⁴ was to be distinguished. Yet, with respect to Poirier J., his failure to elicit any distinguishable features in *Grosterne* that would render it inapplicable to *Lupu* is open to criticism. His reference to the legacy of the rights of usufruct and bare ownership and the juridical effects of the declaration of transmission in paragraph 69 of *Lupu* are puzzling and divorced from basic legal principles, since they appear to have completely overlooked the distinction that the judge in *Grosterne* made between the acquisition of ownership at death and the subsequent delivery of the bequeathed property. The reference is also a *non sequitur* to the lengthy citation of Dallaire J.’s holdings in *Grosterne*. Whether a full right of ownership is at stake or a dismemberment of ownership (such as usufruct and bare ownership rights) makes no difference to the concept of the transmission of these rights at death. Neither is the reference to

13. *Supra*, note 6, para. 22.

14. *Grosterne (Issenman) c. Succession de Sanders (Issenman)*, 2018 QCCS 2180 (C.S. Que.) [Grosterne].

the declaration of transmission of critical significance to the right of ownership, as noted further below in this article.

In *Groster*, the father's Will contained clauses which are identical to Articles 8.1 and 8.2 of the Lupu Will and thus the relevant facts are worthy of consideration, *in extenso*:

1. the deceased executed a notarial will on December 4, 1995, in which he designated his two (2) daughters, Donna and Leanne, as universal residual legatees of his succession, and in a separate legacy denominated as “ a particular bequest”, bequeathed to them the bare ownership of his undivided share of an apartment (the “Condo”), in equal parts (i.e., each daughter was to receive an undivided one-half (1/2) of the deceased's fraction of co-ownership of the Condo). The deceased's surviving spouse, Marilyn, was bequeathed, by virtue of the same particular legacy, the usufruct in the form of a right of habitation of the Condo for the remainder of her lifetime or until she chose to move out, relocate elsewhere or dispose of it;
2. the deceased died in April 2006 and his daughter, Leanne, died in February 2017. At the time of Leanne's death, the deceased's succession had not yet been fully liquidated because Marilyn was still exercising the right of habitation bequeathed to her under his will;
3. in November 2006, a notary prepared a declaration of transmission documenting the delivery of the deceased's undivided share of the Condo to both Donna and Leanne and registered same in the land register;
4. in March 2017, following Leanne's death, the liquidator of her succession prepared and registered a further declaration of transmission confirming that her succession was the owner of, *inter alia*, one-half of 50% of the undivided right of ownership that the deceased held in the Condo, the whole in virtue of the first declaration of transmission. Following the registration of the declaration of transmission, Donna advised the liquidator that she would be contesting it because it was founded on a misinterpretation of the will;
5. thereafter, Donna instituted an action against Leanne's succession to obtain a declaratory judgment to determine

whether the undivided one-half (1/2) of the deceased's 50% of the Condo that was bequeathed to Leanne was delivered to her patrimony prior to her death as a result of the first declaration of transmission;

6. Donna argued that Leanne's patrimony at her death did not include her share of the deceased's undivided share in the Condo because:
 - a) Marilyn was still exercising her right of habitation at the time of Leanne's death in 2017;
 - b) under the will, if one of the daughters were to predecease Marilyn before the deceased's succession was fully liquidated, said deceased daughter's share was to devolve to her surviving legal issue by representation or to the surviving daughter by accretion, rather than to Marilyn, who was solely a particular legatee of the right of habitation created in the will;
7. ultimately, Donna's position was that, since, at the time of Leanne's death, the liquidation of the deceased's estate had not yet been completed (given that Marilyn was still living in the Condo), Leanne's share in the Condo could not have been transferred to her patrimony prior to her death. Since Leanne died without descendants, Donna asserted that Leanne's share in the Condo should automatically accrue to her in her capacity as co-legatee.

Dallaire J. correctly determined that transmission of the bare ownership to the deceased's daughters by virtue of the particular legacy had occurred. Her analysis of the dismemberment of the right of ownership in the form of a usufruct was also correct in law. The very essence of the usufruct whereby the right of use and enjoyment ("*usus*" and "*fructus*") is dismembered from the right of bare ownership ("*abusus*") is the simultaneity of acquisition of the dismembered rights of ownership.

Although the leading authority on usufruct, Madeleine Cantin Cumyn,¹⁵ was not cited in the decision, this author's text makes it patently clear that the hallmark and distinguishing feature of usufruct is that the usufructuary and the bare owner receive their benefits simultaneously. There are no successive rights as in

15. *Les droits des bénéficiaires d'un usufruit, d'une substitution et d'une fiducie*, Wilson Lafleur Ltée : Montréal, 1980, pages 5-6.

the case of a substitution or a trust. There is no hiatus in time in the acquisition of their respective rights.

It would also have been both enlightening and instructive for the court and legal counsel to have considered the masterful article by Professor Jacques Beaulne on the concepts of seisin and ownership in the context of a declaration of transmission.¹⁶

Under the circumstances, the court refused to accept Donna's position, since it would have the effect of suspending the vesting of the bare ownership of the Deceased's undivided right of ownership in the Condo until the completion of all of the steps of the liquidation process. Dallaire J. considered this to be an illogical interpretation of the will, and feared that such a conclusion could risk encouraging malicious liquidators to unduly postpone the completion of liquidation as a means of preventing the delivery of bequeathed property:

In our opinion, such an interpretation would permit a malicious liquidator to delay the end of the testamentary liquidation ad vitam aeternam, so that the delivery of the property (the bare ownership) never could take place, which would endlessly deprive the will from producing the effects desired by the testator.¹⁷

[translation]

Whether Leanne obtained possession of the property becomes irrelevant for the question before the court being the determination of whether her right of bare ownership was an acquired right and thus a transmissible right at the moment of her death to her heirs.

Therefore, the consideration by the court of the concept of possession and seisin as well as of the first declaration of transmission becomes redundant and unnecessary, contributing little or nothing to the ultimate determination of the issue before the court.

The court described the overall purpose of a declaration of transmission as being merely declarative of the transmission of ownership rights that took place at death. Its effects are both declarative and retroactive. A declaration of transmission, however, has no translatory effects as to the right of ownership.

The legal reasoning in *Lupu* is remarkable for its lack of rigour. The court should have applied *Grosterm* and eschewed blindly following the faulty reasoning in *Glickman*. *Glickman*,

16. « Regards croisés sur la saisine du liquidateur successoral et sur les droits des héritiers et des légataires », (2008) 110 *Revue du Notariat* at page 735.

17. *Supra*, note 11, par. 92.

not *Groster*, was the decision to have been distinguished. It is also important, again, to highlight that the lower court in *Glickman* held that a trust had been established. The trust context was glossed over by the Court of Appeal, and relegating the trust context to being inconsequential was unfortunate. In a trust context, a suspensive condition that usually has specified distribution terms for the trust property makes eminently good sense. The hallmark of a trust is the successive acquisition of rights or interests in the trust property over an extended time period. In a matter of succession, it does not, given the immediate and automatic transmission of the right to inherit from the moment of death as encapsulated in the principle, “*le mort saisit le vif*”.

It is incumbent upon the Quebec legal community to realize that *Glickman* is distinguishable from *Lupu* for the following reasons: (1) *Glickman* has to be reviewed in the context of the trust, which the lower court held had been constituted; (2) there was no analogous clause to Article 15.1 of the *Lupu* Will in *Glickman*; (3) in the *Lupu* Will, Article 15.1 was expressly framed as a condition while Article 8.2 was not, but was framed as a representation and accretion provision for secondary devolution purposes, which were inapplicable since Sorin had survived the 30-day suspensive period and manifested his acceptance of the succession; and (4) the reference to the end of liquidation as being “a clearly ascertainable date” in *Glickman* is to be viewed as an unfortunate *obiter dictum* and not as the *ratio decidendi*.

8. Conclusion

It is not only that the Superior Court and the Court of Appeal misinterpreted the so-called suspensive clauses by not adhering to the fundamental tenets of the law of successions, but that both courts did so without offering any reasoned justification. To talk of receiving an acquired successoral entitlement at an indeterminable time dependent wholly upon the liquidator’s performance of her duties is not to talk good law. There must be a legal structure that is enforceable. In both *Lupu* and *Glickman*, this was starkly missing and for this reason, these ought not to be given the distinction of a judicial precedent in any subsequent similar cases.